



M.K. RESOURCES CO., AMERICAN GIRL MINING
JOINT VENTURE, and HECLA LTD.

179 IBLA 299

Decided July 14, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

M.K. RESOURCES CO., AMERICAN GIRL MINING
JOINT VENTURE, and HECLA LTD.

IBLA 2010-35

Decided July 14, 2010

Appeal from a decision by the Field Manager, El Centro Office, Bureau of Land Management, approving the mining and processing for sale of overburden and stockpiled materials. CACA 49292.

Set Aside and Remanded.

1. Administrative Procedure: Burden of Proof--Appeals:
Generally--Environmental Quality: Environmental
Statements--National Environmental Policy Act of 1969:
Environmental Statements--National Environmental
Policy Act of 1969: Finding of No Significant Impact--
Rules of Practice: Appeals: Burden of Proof

A BLM decision based on an EA and FONSI will be affirmed on appeal if it is supported by a record establishing that BLM took a “hard look” at the proposed action, identified relevant areas of environmental concern, and made a convincing case that environmental impacts would be insignificant or reduced to insignificance by appropriate mitigation measures. A party challenging a BLM decision must show it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

2. National Environmental Policy Act of 1969:
Environmental Statements--National Environmental
Policy Act of 1969: Finding of No Significant Impact

Where BLM responded to comments by recognizing its EA was inaccurate, incomplete, and/or

inadequate and would be revised and the record does not show such revisions were made, the Board will set aside the decision record and related FONSI for further action.

3. National Environmental Policy Act of 1969:
Environmental Statements--National Environmental
Policy Act of 1969: Finding of No Significant Impact

Where a substantial environmental question of material significance to a proposed action is raised in comments on an EA and the record does not show BLM took a hard look at that question, the decision record and related FONSI are properly set aside and the case remanded for further review and action.

APPEARANCES: James E. Good, Esq., Jennifer D. Smith, Esq., and Amanda E. Schneider, Esq., for Appellants; Amy L. Aufdemberge, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

M.K. Resources Company (MK), American Girl Mining Joint Venture (AGMJV), and Hecla Limited (Hecla) have appealed the Decision Record (DR) and Finding of No Significant Impact (FONSI) issued by the Field Manager, El Centro (California) Field Office, Bureau of Land Management (BLM), on October 8, 2009. The DR approved the mining and processing for sale of overburden and stockpiled materials from the Padre-Madre Waste Area under a mineral material sales contract awarded to Pyramid Construction and Aggregates, Inc. (Pyramid). The Padre-Madre Waste Area is a 40-acre site in sec. 19, T. 15 S., R. 21 W., San Bernardino Baseline & Meridian, Imperial County, California, that was part of the American Girl Mine (sometimes referred to as the Padre-Madre mine) that had been operated by AGMJV as a joint venture with MK and Hecla.¹ DR at unpaginated 1. The DR and FONSI were based on Environmental Assessment No. CA-670-2008-76 (EA), prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). DR at 1; FONSI at unpaginated 2; EA at 1.

¹ MK served its Notice of Appeal, Statement of Reasons (SOR), and Further SOR on Pyramid, but it has not filed a response or otherwise participated in this appeal.

Based on the record submitted by BLM, and for the reasons described below, we set aside BLM's decision and FONSI.

Background and Issues Presented

BLM entered into a mineral material sales contract with Pyramid on June 25, 2008, for it to mine, process, and market "previously mined overburden and waste rock" at the Padre-Madre Waste Area. DR at 1; EA at 1; FONSI at 1. BLM stated that Pyramid's proposed operations would be "conducted entirely on lands disturbed by previous mining activities, most notably the former AGMJV Padre Madre operations," and that the Padre-Madre Waste Area had "been reclaimed by the previous mine operator in compliance with BLM's surface management regulations at 43 CFR 3809 and the State of California Surface Mining and Reclamation Act of 1975 and promulgated regulations." *Id.* When MK learned of that contract, it expressed liability concerns, prepared an indemnity agreement it requested be made a part of Pyramid's plan of operations, and also requested BLM to "waive all claims of liability of, or right to indemnity against, AGMJV and its joint venture partners for any conditions resulting from the disturbance, handling and removal of the rock materials, as left in place by AGMJV." SOR, Ex. C-1. Rather than expressly respond to MK's requests, BLM prepared an EA and then issued the decision on appeal.

BLM solicited public comment on a November 2008 EA; MK submitted timely, detailed comments under a cover letter dated January 3, 2009. SOR, Ex. C-2 (MK Comments). BLM responded to those comments, but MK contends they were not adequately addressed. *See* DR, Att. B (Response to Comments); SOR at 3. MK claims the off-site use of rock from the Padre-Madre Waste Area could expose it and the Federal government to liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), *as amended*, 42 U.S.C. §§ 9601-9675 (2006), disputes BLM's conclusion that this waste rock "would have no deleterious effect on humans or the natural environments when used . . . as fill, rip-rap, or ballast," and disagrees with its determination that "the proposed action would not trigger significant impacts on the environment based on criteria established by regulations, policy and analysis." SOR at 2, 3; *see* DR at 2-3, 11; FONSI at 2. Unless encapsulated in cement or asphalt, MK maintains the use of this material as fill, rip-rap, or ballast could have adverse consequences, explaining that human exposure was possible if fill is used "in residential, recreational, or school settings" and that environmental exposure would occur if used as rip-rap and ballast. SOR at 3; *see* MK Comments at 1. It also argues that the sampling and testing specified in the DR are flawed and fail to distinguish between disposing of a waste under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (2006), and protecting human health and the environment under CERCLA. SOR at 5-6.

BLM counters that MK's liability concerns are misplaced and overstated. Although waste rock admittedly contains CERCLA hazardous substances, BLM's counsel asserts that these substances "are encapsulated in the rock, and we know from the leach tests that these metals do not easily leach from the rock," adding that MK would face potential CERCLA liability only if it owns/operates the site where fill, ballast, or rip-rap is used. Answer at 5-6. BLM disagrees with MK's assertion that impacts from the proposed action are highly uncertain or involve unique or unknown risks under 40 C.F.R. § 1508.27(b)(5) because:

BLM tested the rock. It knows it contains heavy metals, some samples of which are over the normal crustal abundance [standard]. It also knows that the rock passes leachability tests, and that it will be continuously tested during the removal. It knows the rock is not hazardous waste under RCRA. It has no indication that the rock would pose an imminent or substantial danger to human health or the environment in any future use.

Answer at 7. BLM concludes by characterizing the EA as "robust" and averring that it took a "hard look" at all issues of environmental concern. *Id.*

Discussion

[1] NEPA requires a Federal agency to prepare an environmental impact statement (EIS) when approving a proposed action that would constitute a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2006). Regulations promulgated by the Council on Environmental Quality allow an agency to decide whether to prepare an EIS by preparing an EA and issuing a FONSI when it determines that an EIS is not required. See 40 C.F.R. §§ 1500.4(q), 1501.3, 1508.9, 1508.13. As recently stated in *Oregon Chapter Sierra Club*, 176 IBLA 336 (2009):

A BLM decision to approve an action based on an EA and FONSI will generally be affirmed if BLM has taken a "hard look" at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impacts will be reduced to insignificance by the adoption of appropriate mitigation measures.

The Board will ordinarily uphold a BLM determination that a proposed project, with appropriate mitigation measures, will not have a significant impact on the quality of the human environment if the record establishes that a careful review of environmental problems has

been made, relevant environmental concerns have been identified, and the final determination is reasonable. A party challenging BLM's decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.

Id. at 346-47 (citations omitted). We find MK met that burden in this case.

BLM's Commitment to Revise its EA

[2] MK claims that BLM failed to respond adequately to its comments on the November 2008 EA. Our review of its comments and the record show:

- MK claimed the EA failed to address the off-site use of waste rock, explaining that its use as fill, rip-rap, or ballast “demands an evaluation of potential public health issues.” MK Comments at 1. BLM responded:

BLM has conducted the necessary testing of the materials that characterize the material as to its toxicity. This testing compliments previous work and supports that the rock material is not a hazardous or toxic substance that will adversely affect public health and safety. *The EA will be corrected to reflect this subsequent work.*

Response to Comments at 1 (emphasis added). Yet the final EA used for the DR and FONSI appears to be unchanged, and while the DR refers to “further work” performed in January 2009, DR at 2, the record does not document that work.

- EA Table 5 provides sampling results from four transects for “17 metals listed by the State of California as elements of environmental concern (Title 22; CAM 17 Metals).” EA at 11 (apparently referring to Cal. Code Regs. title 22, § 66261.24); *see* EA App. B (Mineral Report). MK asserted that the use of Crustal Abundance standards in this table is not an appropriate comparative measure, and when used as fill, rip-rap, or ballast, “the comparison should be made of the native soils where the off-site uses will occur.” MK Comments at 1. MK also dismissed the EA's use of Human Toxic Concentration standards because they measure post-exposure concentrations in blood and urine, not whether exposure to those substances could be harmful. It then recommended

that State of California and U.S. Environmental Protection Agency (EPA) documents be used by BLM “as guidance.” *Id.* BLM responded:

The use of crustal abundance and human toxicity were for illustrative purposes. We agree that the Human toxicity levels are not relevant to the purpose of this review. *Table 5 of the EA will be replaced with a more detailed table . . .*

. . . .

The EA will substitute Table 5 with a more comprehensive table reflecting subsequent waste extraction testing (WET), and STLC [soluble threshold limit concentration] and TTLC [total threshold limit concentration] threshold limits uses for the classification of hazardous waste in California.

Response to Comments at 3 (emphasis added). Despite these representations, EA Table 5 appears unchanged from the one MK commented upon.

- Table 5 and most of the EA’s corresponding discussion were based on a November 28, 2008, Mineral Report. In responding to MK comments on that report, BLM identified a “supplemental” report with a “corrected” Table A, referred to subsequent analyses “by WET on all CAM 17 metals,” and represented that the Mineral Report had been (or would be) amended. Response to Comments at 6-8. Neither an amended or supplemental report, nor a corrected Table A are part of the record on appeal, and BLM references to the Mineral Report in the EA appear unchanged.
- Other BLM responses similarly acknowledge a need to revise the EA. For example, BLM states: “*Table 6 will be removed* and substituted with a statement that subsequent WET was done on all CAM 17 metals (including mercury); “[t]he *EA will be corrected* to state that native soils in the area proposed for disturbance under the Padre-Madre plan of operations were removed and stockpiled for reclamation”; “[c]orrections . . . *will be made* as information on the size distribution and potential markets are further identified”; and the Plant Reject Materials section would be revised. Response to Comments at 4 (emphasis added). The record does not show that these revisions were made or otherwise explain why such reversions were unnecessary.

BLM responded to MK's comments by indicating its November 2008 EA was incorrect, incomplete, and/or inadequate. Although BLM represented that its EA would be revised, we are unable to confirm from the record that such occurred. We therefore set aside the DR and FONSI and remand the matter for BLM to address those and other identified deficiencies in the EA.

CERCLA Hazardous Substances and Potential Risks

[3] Without entering into an exegesis on the differences between RCRA and CERCLA, it suffices for our purposes to say that RCRA regulates "hazardous wastes" while CERCLA addresses "hazardous substances" that include, but are not limited to, RCRA hazardous wastes. *See* 42 U.S.C. §§ 6901, 6903(5), 6903(27), 9601(14), 9601(33) (2006). The EA identifies elevated heavy metal levels in waste rock from the Padre-Madre Waste Area that could be toxic if released into the environment, but it states that this rock "would have no deleterious effect on humans or the natural environments when used as . . . fill, rip-rap, or ballast applications." EA at 15. This statement is taken directly from the Mineral Report prepared to aid BLM in determining whether "a hazardous material situation would exist if the material was put to secondary uses." Mineral Report at 6.

The BLM geologist who prepared the Mineral Report first assayed four waste rock samples, which identified elevated levels of seven toxic metals that could adversely affect human health or the environment (*i.e.*, antimony, arsenic, copper, lead, mercury, molybdenum, and zinc). Mineral Report at 9-11. He assumed that waste rock exposed to the elements in construction or industrial applications would leach these toxins at the same rate they would if disposed of in landfill, and then evaluated whether its leachate would be sufficiently toxic to characterize it as a hazardous waste. *Id.* at 11-12.² Without explanation, the Mineral Report concludes that "waste rock from the . . . site would have no deleterious effect on humans or the natural environments when used as an aggregate admixture to concrete and asphalt concretes, or used as fill, rip-rap, or ballast applications." Mineral Report at 2; EA at 15. This conclusion and statement were carried forward in the EA and to the FONSI, which states there would be no adverse public health effects because this waste rock "was determined to be non-toxic and non-hazardous" and because stipulations

² Of the seven heavy metals identified by assay, BLM evaluated only arsenic, lead, and mercury because hazardous waste leachate concentrations had been established for them, no such thresholds existed for molybdenum and zinc, the copper in this rock was determined not to be "mobile," and elevated antimony levels were found in only one sample. Mineral Report at 11-13.

“would ensure that material used in end use products would [not exceed levels for characterizing a waste as hazardous].” FONSI at 4; see EA at 15.

MK strongly disagrees with the unequivocal and overbroad nature of the above-statements as it maintains there is a potentially significant risk to human health and the environment if waste rock is used off-site as fill, rip-rap, or ballast, and that such use could expose the Federal government³ and the company to claims for CERCLA response costs (e.g., for allowing Pyramid to use waste rock as fill or for MK’s earlier disposal of that rock at the Padre-Madre Waste Area). MK commented and contends on appeal that CERCLA guidance documents issued by EPA and the State of California should be used to evaluate the risks posed by using this waste rock as fill, rip-rap, or ballast, claiming that this guidance specifies different testing from what is required under RCRA, “may well become applicable as relevant and appropriate requirements,” and could then be used to require remedial action under CERCLA. SOR at 4, 7; see MK Comments at 1-2; Further SOR at 2-3. By not performing appropriate testing and comparing those results with guidance values for arsenic and other hazardous substances, MK claims BLM is ignoring potential risks to human health and the environment from the off-site use of this waste rock.

BLM was aware that MK was concerned about its potential liability under CERCLA, but the EA does not address the possibility that this waste rock might qualify as a hazardous substance if disturbed and moved off-site. The only attempt to characterize this material was the study that became the basis for EA Table 5, which BLM agrees needs to be revised. See EA at 12-13; Response to Comments at 9-10. This study analyzed samples for 17 heavy metals identified by the State of California for regulating hazardous waste and evaluated those samples for three metals with hazardous waste leachate concentrations established by EPA under RCRA (*i.e.*, arsenic, lead, and mercury). Whether BLM’s conclusion that this waste rock is not a hazardous waste under Federal and state law is correct or sustainable, it does not resolve or otherwise address the issues raised by MK concerning CERCLA and CERCLA “hazardous substances.” See EA at 14-15; Mineral Report at 2, 4, 12-13.⁴

³ The record does not show that BLM ever considered the Department’s potential liability under CERCLA. See 42 U.S.C. §§ 6961, 9607(a), 9620 (2006); *J.R. Simplot Co.*, 173 IBLA 129, 138-41 (2007).

⁴ Notably, the report also states: “While waste rock disposed on the Pyramid contract site is not considered a hazardous solid waste, rock mined in the vicinity of gold deposits is typically enriched in certain heavy metals, that if released into the environment in concentrations that affect human and natural environment systems, may be considered toxic, and classified a hazardous material.” Mineral Report at 7.

The DR provides that “all material leaving the site shall be sampled and analyzed” (except for material encapsulated in asphalt cement products). DR at 8. BLM concedes its prescribed “tests do not speak to whether the rock contains metals that qualify as ‘hazardous substances’ under CERCLA,” admits this rock “contains metals known to be hazardous substances under CERCLA,” recognizes these hazardous substances could be released if that rock is processed, but asserts “there is no basis to conclude that any future release would result in an unacceptable risk to human health or the environment or otherwise require any CERCLA response action that could trigger liability.” Response to Comments at 5. BLM may be correct, but its assertion is not based on an analysis provided in the EA. More to the point, the question is not whether a future release would or might result in an unacceptable risk, but whether BLM had a basis for concluding that its proposed action would *not* significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (2006) (emphasis added); *see* 40 C.F.R. §§ 1508.13, 1508.14, 1508.27.

BLM had “no indication that the rock would pose an imminent or substantial danger to human health or the environment in any future use” before conducting the study reflected in the Mineral Report. Response to Comments at 7. After that study, it still does not. The problem is not simply that the study and report relied on in the EA, FONSI, and DR was concerned with RCRA (and assumedly within the BLM geologist’s area of expertise), but that the EA neither recognizes nor addresses the central question posed by MK - - whether approval of this mining and reclamation plan might lead to or create a substantial threat of a release of hazardous substances into the environment or of any pollutant or contaminant that could present an imminent and substantial danger to public health or welfare. *See* 42 U.S.C. § 9604(a) (2006). This is an area of environmental concern requiring more than a passing glance; it requires a “hard look.”

We find the record fails to show that BLM adequately considered potential risks to human health and the environment under NEPA in deciding that the proposed action is in the public interest. As stated in the EA: “Any decision would assure that the [approved] action is in the public interest, that there are no hazards to public health and safety, and that the action minimizes and mitigates environmental damage.” EA at 2. MK claims there would be a risk to human health and the environment if this waste rock is used as fill, rip-rap, or ballast. Although the Mineral Report, EA, and FONSI state there is “no” such risk, these assertions are not otherwise supported by the record. MK raised significant issues in its comments that were not addressed, and BLM acknowledged deficiencies in its EA that were not corrected. Since MK met its burden to show that BLM failed to consider an environmental question of material significance to the proposed action, and because the record fails to demonstrate that BLM considered all relevant areas of environmental concern, took a “hard look” at potential impacts, or made a convincing

case that any impacts would be insignificant or reduced to insignificance by appropriate mitigation measures, we set aside the DR and its related FONSI. *See Oregon Chapter Sierra Club*, 176 IBLA at 346-47, and cases cited.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the October 8, 2009, Finding of No Significant Impact and Decision Record approving the mining and processing of this waste rock for off-site use are set aside, and this matter is remanded to BLM for further action.⁵

/s/

James K. Jackson
Administrative Judge

I concur:

/s/

James F. Roberts
Administrative Judge.

⁵ If mitigation measures are necessary to avoid significant impacts, “BLM must ensure that those measures are imposed.” *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 141 n.5 (1992), *appeal dismissed sub nom. Pardee Construction Co. et al. v. Lujan*, Civ. No. S-92-978-LDG, RDH (D. Nev. Mar. 15, 1994); *see Missouri Coalition for the Environment*, 172 IBLA 226, 250 (2007); 46 Fed. Reg. 18026, 18038 (Mar. 23, 1981). The current record does not show whether (or how) Pyramid will be required to implement the extensive mitigation measures identified by BLM. *See* DR at 4-11. Nor does it include the reclamation plan filed by Pyramid with BLM or its approval of that plan. *See* 43 C.F.R. §§ 3601.41, 3601.42. If BLM elects to pursue Pyramid’s proposal further, as by preparing an EIA or EA/FONSI, these apparent deficiencies should also be addressed.